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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 236

RIN 0750-AI33

Defense Federal Acquisition Regulation Supplement: Use of Military Construction Funds in Countries Bordering the Arabian Sea) (DFARS Case 2014-D016)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has adopted as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the Military Construction and Veterans Affairs, and Related Agencies Appropriations Act, 2014, that restricts use of military construction funds in various countries, including countries bordering the Arabian Sea.

DATES: Effective [Insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the **Federal Register** at 79 FR 44314 on July 31, 2014, to implement sections of the Military Construction and Veterans Affairs, and Related Agencies Appropriations Act, 2014, that restricts use of military construction funds in various countries, including countries bordering the Arabian Sea. Since 1997, sections 111 and 112 of the annual military construction appropriations acts restrict use of military construction funds for acquisitions exceeding certain dollar thresholds of architect-engineer services and military construction to be performed in certain countries. With some exceptions, these restrictions require award to a U.S. firm or provide a preference for award to a U.S. firm.

One respondent submitted a public comment in response to the interim rule.

II. Discussion and Analysis

DoD reviewed the public comment in the development of the final rule. The comment did not result in any changes in the final rule. A discussion of the comment is provided, as follows:

Comment: The respondent disagreed with the substitution of "Arabian Sea" for the "Arabian Gulf" for the following reasons:

- The respondent viewed the rule as a "degradation of the intent of the law."

- The respondent viewed the rule as harmful to all U.S. businesses, small and large, interested in construction projects in countries that border the Arabian Gulf, due to loss of the 20 percent preference.

The respondent suggested extension of the preferences for U.S. businesses when awarding military construction or architect-engineer contracts in countries bordering the Arabian Gulf to contracts in countries bordering the Arabian Sea.

Response: The interim rule was issued in order to comply with the law. For several years, the restrictions in the annual military construction appropriations acts have applied the use of military construction funds in countries bordering the Arabian Sea, not the Arabian Gulf. The law does not provide the option to provide the 20 percent preference to U.S. firms performing construction projects in countries that border the Arabian Gulf.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and

benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., and is summarized as follows:

This rule is necessary to implement the preference for award only to U.S. firms when awarding certain military construction and architect-engineer contracts to be performed in countries bordering the Arabian Sea.

The objective of this rule is to implement sections 111 and 112 of the Military Construction and Veterans Affairs, and Related Agencies Appropriations Act, 2014 (Division J of Pub. L. 113-76). This rule revises the preference for award to U.S. firms of military construction contracts that have an estimated value greater than \$1,000,000 and the restriction requiring award only to U.S. firms for architect-engineer contracts that have an estimated value greater than \$500,000, to make it applicable to contracts to be performed in a country bordering

the Arabian Sea, rather than a country bordering the Arabian Gulf (as required in earlier statutes).

One respondent stated that the rule would cause harm to U.S. small business entities engaged in construction projects in countries bordering the Arabian Gulf, due to loss of the 20 percent preference. There was no change made to the rule as the result of this comment, because the law no longer provides a preference for U.S. businesses (small or large) performing construction projects in countries bordering the Arabian Gulf. The law changed the applicability of the preference from military construction projects in countries bordering the Arabian Gulf to military construction projects bordering the Arabian Sea.

This will only apply to a very limited number of small entities - those entities that submit offers in response to solicitations for military construction contracts that have an estimated value greater than \$1,000,000 and architect-engineer contracts that have an estimated value greater than \$500,000, when the contracts are to be performed in countries bordering the Arabian Sea.

There is a requirement for offerors to indicate in their offer whether they are a U.S. firm.

This rule does not impose any significant economic impact on small firms. The offeror must represent if it is a U.S. firm,

but in return is granted a preference. DoD did not identify any alternatives that could reduce the burden and still meet the objectives of the rule.

V. Paperwork Reduction Act

The rule does not impose any new information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). However, it modifies the prescription for use of the provision at DFARS 252.236-7010, Overseas Military Construction--Preference for United States Firms, currently approved under OMB Clearance 0704-0255, Defense Federal Acquisition Regulation Supplement (DFARS) Part 236, Construction and Architect-Engineer Contracts, an amount of less than 8 hours. Any change in the burden hours due to the changed prescription is negligible.

List of Subjects in 48 CFR Parts 225 and 236

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Accordingly, the interim rule amending 48 CFR part 225 and 236, which was published at 79 FR 44314 on July 31, 2014, is adopted as a final rule without change.

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